

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 70420-G76M BY CHARLES H.M.)	
AND MARY P. JENSEN)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. However, in order to ensure the permittee is measuring and recording the flow rate and volume of waters diverted, Condition 4 of the Proposal for Decision is modified as follows:

4. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Plaza Suite 105, P.O. Box 5004, Missoula, MT 59806. This condition is being applied to this permit until quantification through permit verification occurs.

The Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the December 13, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Applications for Beneficial Water

CASE # 70420

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FEB 25 1992

Use Permit No. 70420-g76M is hereby granted to Charles H.M. and Mary P. Jensen to appropriate 600 gallons per minute up to 290.35 acre-feet per year of groundwater at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, Township 18 North, Range 28 West, in Mineral County, from the existing well located at this point. The period of appropriation and use is from May 1 through November 1, inclusive of each year. The use of 105 acre-feet of water per year is for new irrigation of 10 acres located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 25 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 23. The use of 184.5 acre-feet of water per year is for supplemental irrigation of 41 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ and 61 acres in the SE $\frac{1}{4}$ of Section 23, and 21 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24. The use of .85 acre-feet per year is for stock water in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24. The priority date shall be 6:15 p.m., March 13, 1989.

1. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided by Montana law.

2. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

3. This permit is issued in conjunction with Permits No. 13859-76M and 42691-76M. The supplemental appropriation of 184.5

acre-feet combined with Permits No. 13859-76M and 42691-76M as granted shall not exceed a total of 600 gpm up to 481.5 acre-feet per annum.

4. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Plaza Suite 105, P.O. Box 5004, Missoula, MT 59806. This condition is being applied to this permit until quantification through permit verification occurs.

5. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If, during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.


6. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424,

MCA.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 21 day of January, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 21ST day of January, 1992, as follows:

Charles H.M. Jensen
Mary P. Jensen
40 Frontage Road West
St. Regis, MT 59866

Robert C. Managhan
Box 191
St. Regis, MT 59866

Frank R. Simkins, Sr.
Pearl D. Simkins
Box 162
St. Regis, MT 59866

John A. Anderson
Box 52
St. Regis, MT 59866

James L. Schreckendgust
Rosalind J. Schreckendgust
Drawer J
St. Regis, MT 59866


St. Regis School Districts
1 and 6
Drawer K
St. Regis, MT 59866

Jean Brough
William L. Brough
Box 243
St. Regis, MT 59866

William Uthman, Hydrogeologist
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 70420-g76M BY CHARLES H.M.)
AND MARY P. JENSEN)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was convened in the above-entitled matter on September 19, 1991, in Superior, Montana, to determine whether a Permit for the above Application should be granted to Charles H.M. and Mary P. Jensen under the criteria set forth in § 85-2-311(1) and (4), MCA.

APPEARANCES

Applicants Charles H.M. and Mary P. Jensen appeared at the hearing pro se.

Howard Newman, Hydrogeologist, appeared as a witness for Applicants.

Objector Robert C. Managhan appeared at the hearing pro se.

Objector John A. Anderson appeared at the hearing pro se.

Objectors James L. and Rosalind J. Schreckendgust appeared at the hearing by and through James L. Schreckendgust.

Objectors Frank R. and Pearl D. Simkins, Sr. appeared at the hearing by and through Pearl D. Simkins.

Objectors Jean and William L. Brough appeared at the hearing by and through Jean Brough.

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Objectors Robert and Dorothy Myers, Duane H. Simons, Matilda Irwin, Virginia M. Guiles, Marion Taylor, Marie Ensign, Marion L. and Ione Mae Buzzard, Christina M. Logan, George and Helen Cruzan, Robert H. and Gloria Hermes, Vernon and Rose Gotcher, Lawrence A. White, Francis B. and Norma D. Hermes, and Leland D. Woodson did not appear at the hearing nor had they made previous arrangements with the Hearing Examiner; therefore, in accordance with ARM 36.12.208, they are in default, their objections are dismissed and they are no longer parties in this matter.

Untimely Objector St. Regis School District 1 and 6 appeared at the hearing by and through Superintendent of Schools, Linda Carlsen.

EXHIBITS

Applicants' Exhibit 1 consists of 37 pages and is a draft report dated September 18, 1991, and entitled "Effects of Irrigation Withdrawals by Jensen and Simons on the St. Regis Aquifer, St. Regis, MT" written by Howard Newman, Hydrologist. This Exhibit was accepted into the record without objection. This Exhibit was superseded with the Final Report dated September 30, 1991, of the "Effects of Irrigation Withdrawals by Jensen and Simons on the St. Regis Aquifer, St. Regis, MT" by Mr. Newman as agreed by all parties at the hearing.

The Department file was made available for review by all parties. There were no objections to any part of the Department file; therefore, it is accepted into the record in its entirety.

PRELIMINARY MATTERS

A request by Objector John A. Anderson was received by the Department on August 23, 1991 and the Hearing Examiner on August 26, 1991, to change the location of the hearing to St. Regis instead of Superior, Montana. See also second paragraph of comments by Objector Anderson dated 28 October 1991, and received by the Hearing Examiner October 29, 1991. The Hearings Unit Legal Secretary attempted to find a suitable place in St. Regis but could find an available room only at the school. Since the St. Regis School District was a party in the matter of Application No. 70454-76M by Jack W. and Emma L. Simons and an untimely Objector in the matter of Application No. 70420-76M by Charles H.M. and Mary P. Jensen, it would not have been proper to hold a hearing in its building. Objector Anderson also requested the time of the hearing be changed to an "evening time" so that a "number of vitally interested artesian well owners and taxpayers" could attend. The Jensen Application received 19 objections and one untimely objection. If each of these objectors were to testify for a period of 30 minutes, the time for the objectors alone would last ten hours which would, with the Applicants' testimony, stretch out to an eleven or twelve hour hearing. This estimate is for the Jensen hearing alone which was held after the Simons hearing. Assuming arguendo the Jensen hearing convened at 5:30 p.m., the hearing would not have been completed until 4:30 or 5:30 a.m. It simply was not feasible to hold the hearing in the evening hours.

It is the Hearing Examiner's belief that Objector Anderson before the hearing did not and even now after the hearing does not realize a contested case hearing held by the Department is conducted as an adversary proceeding where each objector is expected to introduce exhibits, present testimony, call witnesses on his/her behalf, cross-examine the oppositions' witnesses and Department staff witnesses, and make a closing statement. The *number* of objectors attending a hearing is not considered by the Hearing Examiner when making a decision. The Hearing Examiner's decision is based upon the preponderance of evidence presented by the parties. A well prepared party may prevail over twenty poorly prepared parties. Also one *well prepared* lay person who has resided in the area for a long period of time may prevail over expert witnesses. See Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

The record in this matter was left open until November 15, 1991, for submission of the final version of the hydrogeology report on September 24, 1991, to be sent to all timely hearing participants on September 25, 1991. Mr. Newman's final report was received by the Hearing Examiner on or about October 30, 1991. Objectors were to comment on Mr. Newman's final report by October 31, 1991, and Applicants were to address Objectors comments by November 15, 1991.

Objector Robert Anderson's comments were received by the Hearing Examiner on October 29, 1991. In his comments, Objector Anderson suggests a "permanent ban on all further drilling into

this fragile Artesian aquifer could be instituted." A contested case hearing is not the proper forum to initiate the designation of a controlled groundwater area. Section 85-2-506, MCA, sets forth the requirements needed for the Board of Natural Resources and Conservation to designate a controlled groundwater area. Mr. Anderson should visit with the personnel of the Missoula Water Resources Regional Office if he wishes more information on controlled groundwater areas. However, Howard Newman's response to Anderson's comments indicate the St. Regis Aquifer is definitely not fragile and that a permanent ban on further drilling is preposterous.

Comments on Howard Newman's final report were submitted to Michael McLane on September 24, 1991, by William Uthman, Hydrogeologist, and received by the Hearing Examiner on October 30, 1991. Mr. Uthman testified during the hearing that he agreed with Newman's methods and procedures. Mr. Uthman testified that he concurred with Newman's results and interpretations. Mr. Uthman, in his written comments, confirmed his testimony.

Applicants' and Howard Newman's responses to Objector Anderson's comments were received by the Hearing Examiner on November 15, 1991.

Applicants and Jack W. and Emma L. Simons have developed irrigation wells in the same vicinity. Applicants and the Simons retained Howard Newman, Hydrologist, to perform an aquifer test, interpret the information gained during the test in report form, and to testify at the hearing. Three individual aquifer

tests were performed. The results of these tests were addressed in the report which frequently mentions the Simons well.

Although the Simons are not parties at this hearing, it is necessary to include them in this proposal when discussing some of the aquifer tests results. Also, the Hearing Examiner takes administrative notice of the hearing record in the matter of the Application No. 70454-g76M by Jack W. and Emma L. Simons.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (4) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Charles H.M. and Mary P. Jensen duly filed the above-entitled Application with the Department on March 13, 1989 at 6:15 p.m.

3. Pertinent portions of the Application were published in the Mineral Independent, a newspaper of general circulation in the area of the source, on May 25, 1989. Nineteen timely objections and one untimely objection were received.

4. The Applicants seek to appropriate 600 gallons per minute (gpm) up to 290.35 acre-feet per year of groundwater at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, Township 18 North, Range 28

West, in Mineral County.¹ The proposed period of appropriation and use is from May 1 through November 1, inclusive of each year. The proposed use of 105 acre-feet of water per year is for new irrigation of 10 acres located in the E $\frac{1}{2}$ SW $\frac{1}{2}$ NE $\frac{1}{4}$ and 25 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 23. The proposed use of 184.5 acre-feet of water per year is supplemental irrigation of 41 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 61 acres in the SE $\frac{1}{4}$ in Section 23, and 21 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24. The proposed use of .85 acre-feet per year is for stock water in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24. The proposed means of diversion is a well with a 60 horsepower pump. The water would be pumped through a buried mainline (2,000 feet of eight-inch line and 1,200 feet of six-inch line) to one wheel line sprinkler and two quarter-mile hand lines. The well is 157 feet deep and was completed by Eugene G. Kane, a licensed well driller with Kane Well Drilling and Pump Service, on September 30, 1984. The well is cased with ten-inch casing down to 157 feet. (Testimony of Charles Jensen and Department file.)

5. Applicants own the proposed place of use. (Testimony of Charles Jensen and Department file.)

6. Applicants presently hold Beneficial Water Use Permits No. 13859-g76M and 42691-g76M. The instant Application was generated after a complaint was filed by several persons who live in St. Regis. The complaint alleged that the pumping of the Jensen's East Well was causing reduced wellhead pressure to

¹Unless otherwise specified all land descriptions in this proposal are located in Township 18 North, Range 28 West, in Mineral County

several artesian wells in the immediate area. Field investigation and verification of Beneficial Water Use Permits No. 13859-76M and 42691-76M were performed by personnel of the Missoula Water Resources Regional Office as a result of the complaint. (Department file and testimony of Applicant and Michael McLane.)

Permit No. 13859-g76M authorizes Applicants to appropriate 300 gpm up to 132 acre-feet of groundwater per year at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23 to irrigate 92 acres. The means of diversion is a well with a three horsepower pump set at 20 feet in depth. The water is pumped into a storage pit then pumped through the mainline by means of a 25 horsepower pump to a sprinkler system. The places of use authorized by Permit No. 13859-g76M are 12 acres in the NW $\frac{1}{4}$, 40 acres in the SW $\frac{1}{4}$, and 40 acres in the SE $\frac{1}{4}$ of Section 23. The verified places of use are 25 acres in the NE $\frac{1}{4}$, 40 acres in the SW $\frac{1}{4}$, and 65 acres in the SE $\frac{1}{4}$ of Section 23. The verified acreage is 38 acres more than the acreage authorized by Permit No. 13859-g76M. (Department file.)

Permit No. 42691-g76M authorizes Applicants to appropriate 300 gpm up to 165 acre-feet of groundwater per year at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24 for irrigation of 60 acres. The means of diversion is a well with a 60 horsepower electric motor. Applicants have run as many as 65 sprinkler heads from this well at 8.2 gpm per sprinkler head which would require a flow rate of 533 gpm, 233 gpm more than authorized by Permit No. 42691-g76M. The places of use authorized by this permit are 20 acres in the

NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24 and 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23.

The verified places of use are 19 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, 56 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$, and 3 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23. The verified acreage is 18 acres more than authorized by Permit No. 42691-76M. (Department file.)

The instant Application is to bring the excess acreage and flow rate found during verification of Permits No. 13859-g76M and 42691-g76M into compliance with the Montana Water Use Act. The excess acreage and flow rate have been used in part or in toto since 1985.

7. Objector John A. Anderson holds Certificate of Water Right No. 18115-g76M for 99 gpm up to 1.5 acre-feet per year for domestic use. In his filed objection, Mr. Anderson expressed a fear that the additional pumping has a potential of not only reducing but deleting pressure of the artesian aquifer. Anderson took pressure readings in the area; however, he did not specify which well(s) he gauged nor did he keep a written log of the readings. Anderson knew his pressure gauge was not reliable to gauge psi; however, he was more interested in gauging the fluctuation. Unfortunately if the gauge is not reliable for psi, it cannot be relied upon to accurately measure the fluctuation. Objector Anderson relies wholly on artesian pressure for the water supply at his residence. Pressure of approximately 5 to 9 psi works very well for Anderson's system which has never given him any problems. (Testimony of Objector Anderson and Department file.)

Objector Anderson, in his written comments, stated that he finds it difficult, if not impossible, to accept Mr. Newman's conclusions that long-term pumping of the St. Regis Aquifer will not threaten or diminish future water availability. However, Mr. Anderson did not produce any evidence to disprove Mr. Newman's conclusions.

8. Objectors Schreckendgust have experienced some problems with their well. The first year the Jensens pumped their well, Schreckendgusts pumped mud from their well and the pressure dropped from 18 psi to five or less psi. Even now when the Jensen well is pumped, the water in the Schreckendgust well gets murky. Howard Newman believes this is caused by faulty well construction. If the problem were caused by the Jensen well, other wells in the same area, Managhan's well, Altman's well, and Hermes' well would also be muddy. There is no water right of record for the Schreckendgust well. (Department records and testimony of James Schreckendgust and Howard Newman.)

9. Objectors Frank R. and Pearl D. Simkins have filed a Statement of Claim No. 150408-76M for domestic use claiming a flow rate of 100 gpm up to four acre-feet per year. In their objection, Mr. and Mrs. Simpkins stated that the pressure in their well fell from 7 psi to 1.5 psi. However, they did not specify when this occurred. Mrs. Simpkins did not offer testimony at the hearing. (Department records and file.)

10. Objectors William L. and Jean S. Brough hold Certificate of Water Right No. 1145-g76M to appropriate 45 gpm

not to exceed 72.4 acre-feet of water per year for domestic use. Mr. and Mrs. Brough stated in their objection that they did not believe Applicants should run their water day and night, month after month when it is taking the pressure and water from the rest of the well owners. Mrs. Brough did not offer testimony at the hearing. (Department records and file.)

11. Robert C. Managhan holds Acknowledgment of Receipt of Notice of Groundwater Completion No. 2619-g76M claiming a domestic use at 25 gpm up to 1.5 acre-feet per year. During the hearing, Mr. Managhan stated that he did not believe there was anything to worry about in the near future but that someday the Applicants' wells could cause an adverse effect and that the most important thing was to protect the water. (Testimony of Objector Managhan, Department file, and Department records.)

12. Howard Newman conducted three aquifer tests. Under the worst case scenario, which is Jensen pumping at 600 gpm and Simons pumping at 300 gpm for a total pumping rate of 900 gpm, the Park well,¹ at an average distance of 2030 feet from the Jensen and Simons wells, would experience a drawdown of 2.75 feet or a loss of 1.19 psi. The High School well, at an average distance of 2740 feet from the Jensen and Simons wells, would experience a drawdown of 2.36 feet or a loss of 1.02 psi. The Altman and Hermes wells, at an average distance of 3058 feet from

¹Wells monitored during the course during the aquifer test were: Jensen "East", Jensen "West", Jim Jensen, Simons Irrigation, Wood, Mullen Square, Strip Joint, Altman, Managhan, and Wolf.

the Jensen and Simons wells, would experience a drawdown of 2.17 feet or a loss of 0.94 psi. Objector Managhan's well, at an average distance of 3422 feet from the Jensen and Simons wells, would experience a drawdown of 2.02 feet or a loss of .87 psi. During the summer of 1990, when pumping demands were highest, there was about 18 feet of pressure head in the Park well and 24 feet of pressure head in the High School well. Mr. Newman believes a 2.75 foot or 1.19 psi decline at these wells would not adversely affect them or any other well in the area. If artesian pressures fell by as much as two psi below normal winter lows, Simons would not be able to pump his well when Applicant is pumping. Therefore, overall impacts to domestic wells would be lessened. (Applicants' Exhibit 1 and testimony of Howard Newman.)

13. The St. Regis Aquifer is a leaky or semi-confined aquifer. In a semi-confined aquifer, leakage from adjacent strata causes the drawdown in a well to stabilize. Stabilization of drawdown could also be caused by the cone of depression intersecting a recharge or source boundary such as a river or fractured bedrock. It is quite possible that recharge to the deep aquifer comes from all three; vertical leakage, lateral recharge from adjacent bedrock, and one or more of the river systems that flow over or adjacent to the St. Regis Aquifer. In any case, there is a constant source of recharge to the confined St. Regis Aquifer that causes drawdown to stabilize after a certain period of time. The end result is that drawdown does not

continue to increase as a well is pumped. This hydrologic response lessens the impact of a pumped well on adjacent wells. (Applicants' Exhibit 1 and testimony of Howard Newman.)

14. Pumping of any well in the St. Regis Aquifer will cause an impact on another. The degree of impact is determined by pumping rate and distance. However, even when pumping both the Applicant's and the Jensen wells simultaneously for a total withdrawal of 900 gpm, drawdown stabilizes at the Park well' (the closest monitored well) at 1.4 days. The lower the pumping rate, the less time it will take before drawdown reaches equilibrium.

The aquifer responds rapidly to withdrawals, but after pumping ceases, water levels return to pre-pumped levels. Therefore, long-term pumping of the St. Regis Aquifer will not threaten or diminish future water availability in the system. (Applicants' Exhibit 1 and testimony of Howard Newman.)

15. Groundwater levels in the St. Regis Aquifer appear to fluctuate with seasonal stream flow. Groundwater pressures were monitored in two wells during most of the 1990 water year indicating the ground water level fluctuated about 11 feet. Water levels in the St. Regis River from 1959 to 1975, following near normal snowpacks, resulted in seasonal river level fluctuation at St. Regis of only 2.1 to 4.2 feet between peak

'Wells monitored during the course during the aquifer test were: Jensen "East", Jensen "West", Jim Jensen, Simons Irrigation, Wood, Mullen Square, Strip Joint, Altman, Managhan, and Wolf.

flow and low flow elevations. This suggests that recharge to the St. Regis Aquifer is not directly tied to the water levels in the St. Regis River. It is possible that the highest pressures occur during high water periods and the water levels in the aquifer would correlate with the fluctuations of the Clark Fork River system. However, a better and longer period of record needs to be acquired before the relationship to recharge of the St. Regis Aquifer and stream flow is established. (Testimony of Howard Newman and Applicant's Exhibit 1.)

16. Seasonal snowpack appears to have a direct effect on aquifer recharge. The snowpack in the St. Regis area has steadily declined since 1976 but appears to have bottomed out in 1987, 1988, and 1989. Because western Montana has been experiencing successive years of below normal snowpack, a declining water table is both expected and normal. The trend of declining artesian pressure, as reported by several citizen observers, may be explained by the continual decline in mountain snowpack. (Applicant's Exhibit 1 and testimony of Howard Newman.)

17. There are no permits or reservations which would be adversely affected by the proposed appropriation. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

... (4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field

reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use, irrigation, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a).

5. Applicants have possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 5.

6. Applicants have proved by substantial credible evidence the availability of unappropriated water in the source of supply at the proposed point of diversion in the amount requested and that during the proposed period of diversion the amount requested is reasonably available. See Findings of Fact 6, 12, 13, 14, and 15.

7. The Applicants have provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4 and 6.

Although the irrigation of the excess acreage and the excess flow rate use constitute appropriation of water without a permit and is a misdemeanor where criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). Whether the diversion works were operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application No. 61978-s76LJ by

Town. Applicants have successfully used the diversion works to some extent for six years and have at times successfully operated the system to the full extent of the proposed use.

8. Applicants have provided substantial credible evidence the water rights of prior appropriators will not be adversely affected by the proposed project. See Findings of Fact 12, 13, and 14.

The declining artesian pressure reported by the Objectors is more likely to be the result of years of below normal snowpack rather than the pumping of the Applicants' well. See Findings of Fact 15 and 16.

Upon Applicants' discharge of the burden to produce substantial credible evidence on the issue of adverse effect, Objectors must go forward by producing certain information that is particularly, and sometimes exclusively within their power to produce, i.e., Objectors must show they have water rights, describe the operation of their right, state how they anticipate the proposed project will change the conditions of water occurrence or how it will otherwise affect their rights and allege why they will not be able to reasonably exercise their water right under the changed conditions.'

'Although it need not be ruled upon in the instant case, previous rulings by the Department indicate that although a flowing well may be a reasonable diversion, it is not a protectable diversion. Section 85-2-401(1), MCA, clearly states priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of the water table, *artesian pressure*, or water level, if the prior appropriator can *reasonably* exercise his water right

Objectors failed to meet their burden of producing evidence that, contrary to Applicants' evidence, the pressure head would be reduced to the point where the Objectors would not be able to exercise their water rights. Weighing Applicants' evidence against the lack of evidence on the part of the Objectors, the preponderance of the evidence in the record is that the water rights of prior appropriators will not be adversely affected. See Findings of Fact 7, 8, 9, 10, and 11.

9. The fact that there is no water right of record for the Schreckendgusts' well does not necessarily mean they have no water right for that well. See Finding of Fact 8. If the well was drilled prior to January 1, 1962, and was used for domestic and/or stock water, it was exempt from the filing requirement of the Montana Supreme Court order and the Department would have no record of a water right for the well. See Mont. Code Ann. §§ 85-2-212 and 222. If the well was drilled between January 1, 1962, and July 1, 1973, the water was used for domestic and/or stock water, and a notice of completion was filed with the Mineral County Clerk and Recorder, it was also exempt from the filing order. However, if the well was drilled between January 1, 1962, and July 1, 1973, and a notice of completion was not

under the changed conditions. (Emphasis added.) To hold that an appropriator is entitled to maintain artesian pressure against subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier. See In re Application No. 71133-q41B by Hildreth; In re Application No. 42666-q41F by MacMillan; In re Application No. 72498-q76L by Cross; In re Application No. 75997-q76L by Carr.

filed with the Mineral County Clerk and Recorder or if the well was drilled after July 1, 1973, and the owner did not submit a notice of completion to the Department, there is no water right for that well and the Schreckendgusts should take the necessary steps to obtain such a water right. See Mont. Code Ann. § 85-2-306(1) and (2).

10. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 17.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Applications for Beneficial Water Use Permit No. 70420-g76M is hereby granted to Charles H.M. and Mary P. Jensen to appropriate 600 gallons per minute up to 290.35 acre-feet per year of groundwater at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, Township 18 North, Range 28 West, in Mineral County, from the existing well located at this point. The period of appropriation and use is from May 1 through November 1, inclusive of each year. The use of 105 acre-feet of water per year is for new irrigation of 10 acres located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 25 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 23. The use of 184.5 acre-feet of water per year is for supplemental irrigation of 41 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ and 61 acres in the SE $\frac{1}{4}$ of Section 23, and 21 acres in

the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24. The use of .85 acre-feet per year is for stock water in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24. The priority date shall be 6:15 p.m., March 13, 1989.

1. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided by Montana law.

2. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

3. This permit is issued in conjunction with Permits No. 13859-76M and 42691-76M. The supplemental appropriation of 184.5 acre-feet combined with Permits No. 13859-76M and 42691-76M as granted shall not exceed a total of 600 gpm up to 481.5 acre-feet per annum.

4. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. This condition is being applied to this Permit until quantification through Permit verification occurs.

5. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the

Department may make a field investigation of the project. If, during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.


6. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered. The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 13th day of December, 1991.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 13th day of December, 1991, as follows:

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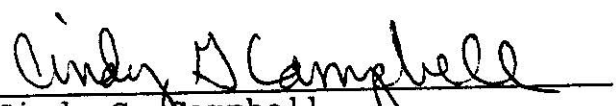
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